United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original - Affidavit of mailing

74-1322

B P/S

To be argued by
FRED F. BARLOW

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1322

In the Matter of the GRAND JURY SUBPOENA of
FRED VIGORITO, ALEXANDER NOCE and DIEGO ASARO,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

EDWARD J. BOYD, V,
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In the Matter of the GRAND JURY SUBPOENA of
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BRIEF FOR THE APPELLANT

Questions Presented

1. Do grand jury witnesses have a right as aggrieved persons under Chapter 119 of Title 18, United States Code, to the suppression or exclusion of the results of court authorized electronic surveillance.

2. Do grand jury witnesses have a right under F.R. Crim. P. 41(e) to suppression and return of their intercepted communications.

Statement of the Case

During April, May and June, 1973, the appellees and numerous other individuals were overheard during court authorized oral electronic surveillances (microphones or "bugs") at the Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York.

In September, 1973 the appellees and approximately 40 other persons were served with inventories pursuant to Title 18, United States Code, Section 2518(8)(d) notifying them of the orders authorizing the interception of oral communications at the above premises, and also notifying them that oral communications had in fact been intercepted during the periods of the three orders.

The orders were signed April 12 and May 3, 1973 (Honorable John R. Bartels) each authorizing interceptions for fifteen days (excluding Sundays), and May 24, 1973 (Honorable Edward R. Neaher), authorizing interceptions for twenty days (excluding Sundays).

The appellees and 31 other persons were then subpoenaed by the Special May 1972 Grand Jury (which had heard evidence in the underlying investigation since July, 1972) to provide voice exemplars for comparison with the intercepted communications. The appellees provided the exemplars. The exemplars in all cases consisted of recitations of the first two paragraphs of the Declaration of Independence.

The subpoenas were issued only to compel the appearance of these persons reflected above, and to obtain the exemplars. No testimony has been taken.

Appellees' motion for discovery of the electronic surveillance orders, and to suppress the use of intercepted conversations pursuant to Title 18, United States Code, Section 2515 was filed December 20, 1973. In oral argument December 28, 1973 the appellees advanced an alternative motion for suppression and return of the intercepted communications under F.R. Crim. P. 41(e).

The District Court (Honorable John F. Dooling, Jr.), in its Memorandum and Order of January 2, 1974, suppressed the use in the Grand Jury of the voice exemplars, communications intercepted pursuant to the orders of April 12, May

3 and 24, 1973, and derivative evidence, until (1) the Government disclosed to appellees' counsel the orders and supporting papers, (with a restriction on disclosure to the appellees), and (2) a reasonable time had elapsed for filing a pre-indictment suppression motion.

Thereafter, the Government filed successive motions for vacation of the Court's January 2, 1974 order and for reconsideration and reargument. Both motions were denied.

ARGUMENT

POINT I

Grand Jury witnesses have no right to suppression or exclusion of the results of court authorized electronic surveillance.

Since *United States* v. *Calandra*, — U.S. —, 94 S. Ct. 613 (1974), it has been clear that grand jury witnesses generally cannot invoke the exclusionary rule. However, the Supreme Court recognized in *Calandra* that the additional statutory provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, Title 18, United States Code, Sections 2510-2520 (Ch. 119), went beyond the existing law. The extent of Title III's remedies is the salient issue in this appeal.

In *Gelbard* v. *United States*, 408 U.S. 41, 92 S. Ct. 2357 (1972), the Supreme Court faced for the first time the applicability of the evidentiary prohibition of Title 18, United States Code, Section 2515. In holding that immunized grand jury witnesses could invoke Section 2515 as a contempt defense under Title 28, United States Code, Section 1826(a), the Court was required to assume that the electronic surveillance in *Gelbard* had not been conducted in accord with the statutory provisions of Title III, because the

fact of authorizing court orders was not in the record.[1] Mr. Justice White, whose concurrence was the deciding vote in *Gelbard,* rested his decision upon whether or not there had been authorizing orders.

> "I agree with the Court, however, that at least where the United States has intercepted communications without a warrant in circumstances where court approval was required, it is appropriate in construing and applying 28 U.S.C. § 1826 not to require the grand jury witness to answer and hence further the plain policy of the wiretap statute. This unquestionably works a change in the law with respect to the rights of grand jury witnesses, but it is a change rooted in a complex statute the meaning of which is not immediately obvious as the opinions filed today so tellingly demonstrate.
>
> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and in any event, the deterrent value of excluding the evidence will be marginal at best. It is well, therefore, that the Court has left this issue open for consideration by the District Court on remand. See n. 22, p. 2368, ante.

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[1] In fn. 22, 92 S. Ct. at 2368, the Supreme Court left for decision by the District Court on remand whether the fact of court orders would compel Gelbard and Parness to answer. However, no further action occurred with respect to these witnesses.

> Of course, where the Government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer." 92 S. Ct. at 2372-73.

This Court, in *In the Matter of Alphonse Persico*, — F.2d — (2d Cir.), slip op. 1819, decided February 19, 1974, recently adhered to this dichotomy, holding that an immunized grand jury witness who had challenged the legality of authorized interceptions both as a defense to contempt and by a suppression motion was not entitled to examine the underlying court orders, which were in evidence. In *Persico*, Judge Waterman reviewed the legislative history of Title III, 1968 U.S. Code, Cong. & Ad. News 2112, 2195, and reasoned that the only way to reconcile the dual purposes of protecting witness' rights with the public's interest in the smooth functioning of the grand jury is by:

> "interpreting the statute as requiring exclusion only when it is clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has been established in a prior judicial proceeding. In these situations both statutory policies—the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings—are served. But where illegality is claimed and, if established, can be established only by way of a plenary suppression hearing, one important aim of the legislation would be frustrated.

Appellant, however, referring also to the language of the legislative history quoted above, would have us find that the contempt proceeding here is a proceeding in 'another context' and therefore the general prescription against hearings upon motions to suppress

> in grand jury proceedings does not prevent motions to suppress and hearings thereon in contempt proceedings arising out of a witness's refusal to answer a grand jury's question. While appellant's argument is a superficially plausible one, his reasoning in support of the argument is unrealistic. The contempt mechanism employed here to coerce testimony is so intimately connected with the grand jury proceedings in which the testimony is desired as to be really a part of these proceedings. Obviously, any expansion of the breadth of inquiry permissible in a contemporaneous contempt proceeding initiated because of the recalcitrance of a grand jury witness necessarily inhibits the smooth functioning and efficient operation of that grand jury."

Slip Opinion, at 1828-29.

The Government submits that the appellees, who face possible indictment resulting from the grand jury investigation, are therefore much more intimately connected with the grand jury proceeding, and that the prohibition against suppression motions and hearings should be even stronger than in the case of recalcitrant grand jury witnesses.

The First Circuit, when faced with a suppression motion similar to this case, held that:

> "whatever rights a witness may have in a defense to a contempt proceeding, he may not anticipate such a proceeding by bringing a motion to suppress evidence before the grand jury. This result strikes a balance between the requirements of the federal wiretap statute and the efficient functioning of the grand jury. It allows the grand jury to proceed, uninterrupted by lengthy suppression hearings unless and until the power to compel testimony is invoked. The aggrieved grand jury witness is not left without remedies for the unlawful interception. While remedies

> other than suppression may be less efficacious in protecting individual rights, it must be remembered that the Omnibus Act provides greater protection than previously existed." *Cali* v. *United States*, 464 F.2d 475, 478-9 (1st Cir. 1972). See also, *In Re*: *Marcus*, — F.2d —, Docket No. 74-1006 (1st Cir., Jan. 31, 1974).

In its Memorandum and Order of January 2, 1974, the District Court conceded the existence of the relevant orders authorizing interception, but reasoned that:

> "Unless it is intended that the only safeguard against transgression of [Title 18, U.S.C. § 2515] shall be the *ex parte* judge's review of the material submitted to him to support the order for interception, it would appear that persons evidently exposed to indictment based on the use of intercepted conversations before the grand jury, should have a means of determining that the interception orders were issued and were issued upon a showing that met the standards of Section 2518." Memorandum and Order at 2.

The Government submits that in light of *Persico* and *Cali*, above, that this premise is no longer valid; the ordered inspection of the orders and supporting papers was but a prelude to a full-blown suppression hearing, as can be seen from the ordered compliance:

> "It is accordingly
>
> ORDERED that no use be made before any grand jury of any of the tape recordings taken pursuant to the orders of April 12, May 3 and May 24, 1973, of conversations of or implicating the moving parties, or any matter derived from them, or any use of the voice exemplars, until after disclosure to counsel for the moving parties (subject to the restriction on further disclosure to the moving parties set forth above) of

> the orders and the supporting papers and the expiration thereafter of a reasonable time for such counsel to proceed further with the present motion to suppress the use of the intercepted matter, matter derived from it and the voice examplars." Memorandum and Order, p. 4.

Another ramification of the order is that, although it purports only to raise the facial validity of the Title III orders, Section 2515 prohibits disclosure of electronic surveillance information "if the disclosure of that information would be in violation of this chapter [119]". Therefore, any hearing pursuant to §2515 would be plenary in nature, involving probable cause and statutory compliance in the orders and supporting papers, minimization, court supervision, sealing, etc. All these issues would be litigated in an adversary hearing at a time when the grand jury investigation would be largely inchoate because of the prior exclusion and suppression ordered by the Court.

The Government submits that neither the wording of Title III, its legislative history, or the developing case law interpreting it, permits such a departure from the normal criminal process, in which evidence is tested in adversary proceedings *after* issue has been joined by a charge and the pleas to it.

POINT II

Court authorized intercepted communications are clearly not suppressible or obtainable by Grand Jury witnesses under F.R. Crim. P. 41(e).

There is no doubt that the appellees and others in their class are not entitled to return of intercepted communications as tangible property. In *Bova* v. *United States,* 460 F.2d 404 (2d Cir. 1972), where immunized grand jury witnesses appealed from the denial of their pre-indictment suppression motions, Chief Judge Friendly noted that:

> "[t]elephone conversations are not 'property' in the ordinary meaning of language, nor is there any effective method for their 'return'. It is obviously impossible to excise and surrender to the appellants the memories of the agents who conducted the interceptions, and the tapes and logs, as tangible items, are the Government's property, not the appellants." 460 F.2d at 407.

The Government submits that this lack of subject matter precludes use of Rule 41(e) as a remedy in this case, and that the appellees must move under Title 18, United States Code, Section 2518(10). See *Calandra, supra.*

Assuming *arguendo* that appellees have Rule 41(e) rights, their motion is insufficient on its face. Rule 41(e) speaks of suppression and return only to persons entitled to *lawful* possession of property, and there has been no such allegation by the appellees.

CONCLUSION

The Government respectfully submits that the Order of January 2, 1974 should be reversed in all respects, for the reasons stated above.

Respectfully submitted,

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Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 5th day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of Brief for the Appellant of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Gustave H. Newman, Esq.
522 Fifth Avenue
New York, New York 10036

Sworn to before me this
5th day of April 1974

Frances A. Grant

FRANCES A. GRANT
Notary Public, State of New York
No. 41-4503731
Qualified in Queens County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19__, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19__

United States Attorney,
Attorney for _____

To:

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19__

United States Attorney,
Attorney for _____

To:

Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.

Dated: _____, 19__

Attorney for _____

FPI:LC-SM-8-73-7555